REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 63872/16

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

In the matter between:

CRAFFERT, FRANCOIS Plaintiff

and

ROAD ACCIDENT FUND **Defendant**

JUDGMENT

FLATELA; A.J

Introduction

[1] The matter was allocated to me on 29 October 2021 for the determination of loss of earnings and past and future medical expenses. The liability and quantum in respect of general damages have been settled. The defendant is liable for 20% of the plaintiff's proven damages. The general damages were settled in the amount of R 180 000.00 (One Hundred and Eighty Thousand Rand Only).

[2] On the 24 January 2015, the plaintiff, a scrapyard owner sustained serious injuries on the R37 road between Lydnburg and Sabie whilst driving a motorcycle with registration numbers [….]. The plaintiff alleges that an unknown motor vehicle moved into his lane and forced him off the road. The plaintiff was injured as a result of the negligent driving of the insured driver. Neither the owner nor the driver could be established.

[3] The plaintiff was hospitalised and treated at Nelspruit Medic Clinic.

[4] The plaintiff seeks past medical expenses in the amount of R530 000.35

[5] In terms of the amended particulars of claim, the Plaintiff has sustained certain bodily injuries, not limited to but including:

5.1 Left knee dislocation;

5.2 Fracture of the left tibia and fibula;

5.3 Fracture of the sternum;

5.4 Internal injuries;

5.5 A comminuted fracture at the base of the left third metatarsal;

5.6 An oblique fracture of the right scapula;

5.7 Severe scarring and disfigurement;

5.8 Multiple bruises, abrasions and lacerations;

5.9 Psychological and Psychiatric sequalae as a result of the injuries sustained in the accident;

5.10 Traumatic brain injury with neuropsychological and neuropsychiatric sequelae;

5.11 Soft tissue injuries of the cervical spine and lumber spine.

[6] As a result of the injuries sustained, the plaintiff suffered the following:

6.1 Estimated Past Medical and Hospital expenses	R 3 000 000.00
6.2 Estimated future medical and hospital expenses	R 350 000.00
6.3 Estimate past and future loss of income	R 6 580 125.00
6.4 General Damages	R 1 500 000.00
6.5 TOTAL	R 11 430 125.00

Future Loss of Earnings

[7] The plaintiff contends that he suffered loss of earnings in the amount of R 2 232 020.00 less 80% apportionment. This is bolstered by the actuarial certificate from Ivan Kramer CC who calculated the plaintiff's pre-morbid position as R771 531 and R 1 870 666.00 post-morbid position. A contingency deduction of 5% for past loss and 15% for future loss of income was applied.

[8] In calculation of the loss of earnings, the actuary relied on the report of Ms Chista Du Toit, an Industrial and Counselling Psychologist who examined the plaintiff on 17 April 2018.

[9] Ms Du Toit states the following in her report.

But for the accident.

[10] At the time of the accident Mr. Craffert operated a scrap metal business. He reportedly generated a profit of R70 000.00(Seventy Thousand Rands Only) per month and R840 000 per annum and a calculation was done on the basis of his reported but unsubstantiated income.

[11] On 27 October 2021 two days before the trial date Ms. Du Toit amended her report due to the unavailability of proof of income allegedly derived from the business. In her amended report Ms Du Toit has provided an alternative scenario that must be used in calculating the loss of income. She states the following:

> 11.1 "in the absence of availability of financial information regarding Frame Scrapmetal CC and should Mr. Craffert, for whatever reasons, have taken the decision to enter the labour market in an employed capacity, this would probably have been as a semi-skilled worker. For quantification purposes and as a guideline, noting Mr. Craffert's age of 36 years at the time of the accident, matric qualification and experience as a business owner, earning capacity in the open labour market somewhere around age 40 years, is projected on

approximately the average between the median and upper level of semi-skilled workers per Robert Koch (R140,500.00 per annum). Inflation-based increases would be applicable. In this regard, general earning scenarios for semi-skilled workers with a matric qualifications and relevant experience in the open labour market refers. Applicable contingencies can be applied to accommodate uncertainties regarding availability of work / remuneration."

Having regard to the accident

[12] Having considered various experts referred to in her report Ms Du Toit concluded as follows regarding the plaintiff's employability: -

12.1 "Mr Craffert's occupational functioning has been considerably compromised by the sequelae of the injuries he sustained in the accident. The combination of his physical-, cognitive-communication profile-, cognitive-and psychiatric limitations have negatively affected his employability. It can be concluded that the accident has negatively affected Mr Craffert's ability to work in a similar way as pre-accident. He is an unequal competitor in the open labour market. Acknowledging Mr. Craffert's present age (40 years) and work history, having only ever worked in a self-employed capacity, performing physically demanding work as well as his limitations and prognosis, as elucidated by the various experts, it is considered unlikely that he will be able to generate any meaningful income. He is consequently rendered unemployable for the rest of his life. A total loss of work- and earning capacity will then be indicated.

[13] Ms Du Toit referred to the following experts

13.1 Dr Read, Orthopaedic Surgeon

13.2 Dr Read an Orthopaedic Surgeon records the plaintiff's injuries as follows: -

13.2.1 Mr. Craffert sustained severe injuries involving the left distal femur and the left proximal tibia. He has had more than forty surgical procedures performed on the left lower limb. The last surgical procedure was by way of a total knee replacement in November 2017.

13.2.2 An MRI showed that he sustained a fracture of the antero-medial aspect of the left medial femoral condyle and the postero-lateral aspect of the left lateral tibial plateau.

13.2.3 There was complete rupture of the anterior and posterior cruciate ligaments and rupture of the tibial collateral ligament.

13.2.4 There was also a fracture of the left fibula with rupture of most of the postero-lateral corner ligaments and tendons.

13.2.5 Mr. Craffert has had recurrent bouts of infection in the left lower limb.

13.2.6 He has a constrained knee. The left patella is destroyed. He has a varus deformity in the left lower limb with a significant limb length discrepancy, measuring 5cm.

[14] At the time of assessment, Mr. Craffert informed Dr Read that he has been infection free for the past six months. However, he is still at risk of developing infection in his left lower limb. Osteomyelitis is an extremely difficult condition to treat and control. There is every chance that he may well end up with an above knee amputation.

[15] He will require conservative treatment. Dr Read also noted soft tissue injuries to the cervical- and lumbar spine, multiple right-sided rib fractures, a comminuted fracture at the base of the left third metatarsal and an oblique fracture of the right scapula. No abnormalities were noted in this regard, other than occasional symptoms in the axial skeleton that is aggravated by strenuous activities and pain over the right side of the chest wall following the rib fractures.

[16] Dr Read is of the view that should Mr. Craffert find suitable employment -in the future; it would have to be of a purely sedentary nature with light manual duties only. However, he has only ever been technically trained. It may be difficult if not impossible for him to find suitable employment in the future.

[17] **Kerryn Kelly**, Occupational Therapist's opinion is that Mr. Craffert should be suited to work with the following characteristics:

17.1 Limited to work of sedentary to light physical capacity only.

17.2 Prolonged, repetitive movements involving the left lower limb should be limited

17.3 Walking should be limited to occasionally and over a level non-slip surface. He should not be required to walk at a fast pace.

17.4 Stooping and kneeling should be limited to occasionally (up to 1/3rd of the day).

17.5 Squatting, standing, climbing stairs or climbing a step ladder should be limited to rarely (up to 5% of the day).

17.6 Crouching should be avoided.

17.7 Work should not involve operating pedals with the left lower limb.

17.8 Standing and walking should be alternated throughout the working day and allow for periods of working in a seated position.

17.9 Rest breaks and postural changes are recommended.

[18] When considering his educational background and work history, Mr. Craffert has always relied on his physical skills and abilities to secure work. Due to his physical limitations as a result of the accident in question it can be argued that he will struggle severely to find alternative employment that will meet the physical requirements as set out in the report.

[19] Should he undergo a left leg amputation as possibly indicated by the Orthopaedic Surgeon his ability to find employment would be even more difficultin the future. His level of productivity will be further affected due to extra time it may take him to access facilities such as the bathroom and to move around his workspace.

[20] Ms. Kerry is therefore of the view that owing to the injuries sustained, Mr. Craffert is now unable to fairly compete with his able- bodied peers in the open labour market.

His injuries have therefore compromised his employability and he is now at a significant disadvantage with regards to his competitiveness in the open labour market.

[21] Ivan Kramer CC – The actuarial certificate of value shows the following values per value. The certificate based on alternative calculations.

Values below are in Rands	but for the accident	having regard to the accident	net loss
Gross accrued value of income	771 531	0	
Less contingency	38 577	0	
Net accrued value of income	732 954	0	732 954
Gross prospective value of income	1 870 666	0	
Less contingency	280 600	0	
Net prospective value of income	1 590 066	0	1 590 066
Total value of income	2 323 020	0	**2 323 020**
Contingency %			
accrued	5,0%	n/a	
prospective	15,0%	n/a	

[22] The plaintiff applied contingency values between 5% and 15% in respect of pre-morbid position and 0% on post morbid.

Past Medical Expenses

[23] In terms of invoices and schedules filed, the past medical expenses amount to R 2 650 001.76. Furthermore, an affidavit of an official from Discovery Medical Clinic confirmed the amount as the amount paid by the medical aid.

[24] The plaintiff seeks an amount of R 530 000.35 which is 20% of the expense

The Legal Principles

[25] The legal principle in respect of a claim for diminished earning capacity is trite in that the Plaintiff must be placed in the position he would have been in had the injuries not occurred. To succeed in the claim for loss of income or earning capacity, the Plaintiff has to establish on a balance of probability that as a result of the accident, he has lost future earning capacity[1].

> 25.1 On the claim for loss of earnings Gough[2] states:
>
> 'If one were to regard the loss as one of future earnings one may ask the question "what income will the plaintiff actually lose as a result of the defendant's wrongful act?'.

[26] Lowe J dealt with this issue recently in Angelique Prince v RAF[3] quoting Corbett, he said the following:

> 26.1 Again as pointed out by Corbett[4]:
>
> "Before damages payable to the injured person can be assessed, it is necessary that the court should determine factually what injuries were suffered by the plaintiff as a result of the defendant's wrongful act..."

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[1] Rudman v RAF 2003 (SA)234 (SCA)
[2] Gough "The Lost years" The claim for loss of earnings '(1983) De Rebus 486
[3] (CA 143/2017) [2018] ZAECGHC 20
[4]Quantum of Damages, Volume 1: Corbett Fourth Edition, Gauntlett at p 30.

[27] In this regard, the question that must first be answered in the assessment of damages is and what must be determined is:

> "…disability which is likely to impair the injured person's earning capacity or to cause a loss of the amenities of life. Such disability may be temporary or permanent. Where it is temporary and has in fact disappeared at the time of trial, it is not normally of great importance as an independent factor.… On the other hand, where it is permanent or where, though temporary, it extends beyond the time of the trial, then it may cause prospective losses, such as a diminution in the injured persons earning capacity or an impairment of the amenities of life, for which compensation should be made by the award of damages. Moreover, a permanent disability may be present at the time of the trial or it may be one which will only manifest itself at some future date."

Discussion

[28] This matter like almost all the RAF matters is not defended. In determining whether the plaintiff has proven on a balance of probabilities that he has lost the earnings I should examine the evidence before me. The defendant did not file any expert report.

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[29] The plaintiff relies on the evidence of expert witnesses.

[30] ***In RAF v Kerridge*** [5] **Nicholls J** said the following on the role of the experts.

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[5] **2018] ZASCA 151**

‘The role of experts in matters such as these and the opinions they provide can only be as reliable as the facts on which they rely for this information. Too readily, our courts tend to accept the assumptions and figures provided by expert witnesses in personal injury matters without demure. The facts upon which the experts rely can only be determined by the judicial officer concerned. An expert cannot usurp the function of the judicial officer who is not permitted to abdicate this responsibility – the court should actively evaluate the evidence. Ideally, expert evidence should be independent and should be presented for the benefit of the court. It is not the function of an expert witness to advocate the client’s cause and attempt to get the maximum payout, as most seem to believe. This problem is exacerbated by the Road Accident Fund (the Fund) which fails to properly investigate the true situation of a claimant and is content to rely on projections and assumptions of experts with no factual basis.’ (Footnotes omitted).

[31] The plaintiff’s injuries are common cause. At the time of accident, he was self-employed managing his scrap yard. He employed one laborer, paying him R150 per day.

[32] His job included driving around 100km per day collecting pieces of metal, loading it on a bakkie and returning to his workshop, where he would strip the metal out using scanners and cutting torches.

[33] After the accident he was unable to return to his business due to the seriousness of his injuries. He can only do the job that is of purely sedentary nature with light manual duties. It may be difficult for him to find suitable employment in future regard being had to his education qualification and age. He has a matric certificate. Due to the injuries, he sustained he will not be fairly competing with his able-bodied peers in the market.

[34] There is no evidence to rebut the plaintiff's case. If regard is had to the plaintiff's injuries and treatment he received, I am convinced that the plaintiff has proven on a balance of probabilities that he has lost earning capacity. However, there is no evidence that the plaintiff will not be able to work until the age of 65 years. Kerry Kelly, Occupational Therapist is of the opinion that has retained the cognitive capacity to continue running his own business and to perform the managerial side of the business. She opines that he would have to employ additional assistance to complete the physical task.

[35] In ***Southern Insurance Association v Bailie***[6] *Nicholas JA* at 113 F – 114A

> stated as follows: 'Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss. It has open to it two possible approaches. One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown. The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative.
>
> It is manifest that either approach involves guesswork to a greater or lesser extent. But the Court cannot for this reason adopt a non possumus attitude and make no award…'.

[6] **1984 (1) SA 98 (A)**

[36] Contingency is a matter that is left at the discretion of the court. Based on the individual circumstances of each claimant, contingencies are there to cater for future unforeseen circumstances, which might render the plaintiff unable to perform as per his pre morbid potential or limit his performance, taking into account the reports by the experts in particular. The plaintiff, will have to exert more effort to cope and be able to perform on par with his colleagues. In this regard a general contingency of 10% and 25% is fair in the circumstance.

[37] Based on the alternative scenario, the following calculation has been performed:

Values below are in Rands	but for the accident	having regard to the accident	net loss
Gross accrued value of income	771 531.00	0	
Less contingency 10%	77 153.10	0	0
Net accrued value of income	694 377.90		694 377.90
Gross prospective value of income	1 870 666.00	0	
Less contingency 25%	467 666.50	0	0
Net prospective value of income	1 402 999.50	0	1 402 999.56
Total value of income	**2 097 377.40**	**0**	**2 097 377.40**
Contingency %			
Accrued	10%		
Prospective	25%		
Less 80%	419 475.48		

[38] In the result, I make the following order:

1. After an 80% apportionment the Defendant shall pay to the Plaintiff a capital amount of R1 129 475.83 (one million one hundred and twenty-nine thousand four hundred and seventy-five eighty-three cents) of which;
    a. R419 475.48 is in respect of Loss of earnings
    b. R530 000.35 is in respect of Past hospital and medical expenses.
    c. R180 000.00 is in respect of General Damages

2. Together with interest a tempore mora calculated in accordance with the prescribed rate of interest Act 55 of 1975, read with section 17(3)(a) of the Road Accident Fund Act 56 of 1996 which interest shall start to run 14 days from date of delivery of judgment.
3. Payment will be made directly to the trust account of the Plaintiff's attorneys within a hundred and eighty (180) days from the granting of this order: Provided that interest shall start running on the capital amount within 14 days of granting this order.

HOLDER	De Broglio Attorneys Inc
ACCOUNT NUMBER	[….]
BANK & BRANCH	Nedbank, northern Gauteng
CODE	198 765
REF	c527

4. The Defendant is ordered in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 to reimburse 20% of the Plaintiff's costs of any future accommodation of the plaintiff in a hospital or nursing home, or treatment or rendering of service to him or supplying goods to him arising out of injuries

sustained by plaintiff in a motor vehicle accident on which the cause of action is based, after such costs have been incurred and upon proof thereof.

5. The Defendant is to pay the Plaintiff's agreed or taxed High Court costs as between party and party, such costs to include the preparation and qualifying and reservation fees of the experts, consequent upon obtaining Plaintiff's reports, the Plaintiff's reasonable travel and accommodation costs to attend the Defendant's and own experts, the costs of all the Plaintiff's expert report, addendum reports, and confirmatory affidavits and costs of counsel. All past reserved costs, if any, are hereby declared costs in the cause.
6. The Plaintiff shall, in the event that the costs are not agreed:

   6.1 serve the Notice of Taxation on the Defendant's; and

   6.2 allow the Defendant fourteen (14) days to make payment of the taxed costs.

7. There is a valid contingency fee agreement in existence between the Plaintiff and

her Attorneys.

FLATELA L

ACTING JUDGE OF THE HIGH COURT

This Judgment was handed down electronically by circulation to the parties' and or parties' representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 10h00 on 8 February 2021.

Date of Hearing:	29 October 2021
Date of Judgment:	8 February 2021
Plaintiff's' Counsel:	Adv Justine Erasmus
Instructed by:	De Broglio Attorneys Inc.
Defendant' 's Counsel:	Not represented